83-414

No.

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-THREE

CHARLES D. GRIGGS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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COUNSEL FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

WHETHER PROSECUTION ON THE INSTANT INDICTMENT IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL AS SET FORTH IN ASHE v. SWENSON, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 496 (1970)?

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TABLE OF AUTHORITIES

Petitioner, Charles D. Griggs, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 27, 1983.

DECISION BELOW

The Court of Appeals entered its Order affirming in part and reversing in part the judgment of the District Court on May 3, 1983. Said Order became final on June 27, 1983, when the Petition for Rehearing was denied. A copy of Court's opinion and the Orders on Petitions for Rehearing, which are not to reported officially, are attached hereto.

JURISDICTION

The judgment of the Court below was entered on May 3, 1983, and became final on June 27, 1983, when Defendant's Petition for Rehearing was denied. The

Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

On May 31, 1979, a grand jury issued an indictment (first case) charging Mr. Griggs with three (3) counts of passing and uttering counterfeit money in violation of 18 U.S.C. §472. Count I of the indictment alleged that on April 20, 1979, Mr. Griggs, with the intent to defraud, passed and uttered to employees of Twelve North Restaurant, Jacksonville, Florida, five (5) forged and counterfeited federal reserve notes in fifty ($50.00)

dollar denominations. Count II of the indictment charged that on April 20, 1979, Mr. Griggs, with the intent to defraud, passed and uttered to an employee of Page One Lounge, Jacksonville, Florida, one (1) forged and counterfeited federal reserve note in the denomination of fifty ($50.00) dollars. Count III of the indictment charged that on April 20, 1979, Mr. Griggs, with the intent to defraud, passed and uttered to another employee of Page One Lounge, Jacksonville, Florida, one (1) forged and counterfeited federal reserve note in the denomination of fifty ($50.00) dollars.

After a week-long trial, June 25 through 29, 1979, the Defendant was acquitted by the Court on Count III and was found not guilty by the jury on the remaining two (2) counts.

Subsequent to the defendant's

acquittal on the first case, Mr. Griggs was again indicted on November 28, 1979, for counterfeit violations arising out of the same set of operative facts upon which the first indictment was based. Count I of the subsequent indictment (second case) charged Mr. Griggs with conspiracy to utter and to sell, exchange or transfer certain counterfeit fifty ($50.00) bills. Count II through V charged the Defendant with various substantive counterfeiting violations.

This second case was the subject of a pre-trial motion to dismiss virtually identical to the one filed herein. The denial of that motion to dismiss was the subject of an interlocutory appeal. United States v. Griggs, 651 F.2d 396 (5th Cir. 1981). In that appeal, the Court reversed the trial court's ruling with respect to its denial of the motion

to dismiss on Count V only. The Court of Appeals, after a thorough review of the record in the first case, held that the first jury necessarily determined that Mr. Griggs was unaware that the counterfeit currency in his possession on April 20, 1979, was in fact counterfeit. Id. at 400. The case was remanded back to the trial court with directions to dismiss Count V.

The instant indictment was filed approximately three (3) months after the second case and is again based on the same set of operative facts as were the first two cases. Specifically, the Defendant is charged with perjury in connection with the testimony he gave at his first trial concerning charges of which he was acquitted.

Count I of the instant indictment alleged that it was material to the trial to determine "whether Charles D. Griggs

ever knowingly possessed counterfeit bills during April, 1979." Count I further alleged that Mr. Griggs' testimony concerning this issue was false in that the Defendant "had possessed counterfeit bills, had provided counterfeit bills to Mr. Frederick Allen Kirschwing, and attempted to pass a torn counterfeit $50 bill at the Page One Lounge April 20, 1979." This Count was dismissed by the trial court as a result of the opinion in United States v. Griggs, 651 F.2d 396 (5th Cir. 1981).

Count II of the instant indictment alleged that it was material to the trial to determine "whether Charles D. Griggs had gone to see Mr. Frederick Allen Kirschwing at a cabin and fish camp on the St. Johns River after Griggs had been arrested on the charges in that case." Count II further alleged that Mr. Griggs'

testimony concerning this issue was false in that the Defendant "after his arrest on counterfeit charges, had gone to see Mr. Frederick Allen Kirschwing at a fish camp and cabin near the St. Johns River."

Count III alleged that it was a matter material to the trial to determine whether the Defendant had "within a few days after April 20, alerted other persons that Griggs and other person might be under investigation concerning counterfeit money and advised them what to do." Said Count further alleges that Mr. Griggs' testimony on this issue was false in that he "had advised Frederick Allen Kirschwing and Howard Jerome Kinsey, Jr. before April 26, 1979, that Griggs had heard authorities were looking for Griggs and perhaps them in connection with counterfeit money, and advised them

what to do."

The District Court herein dismissed Count IV for failure to state an offense.

Count V alleges that it was material to determine whether the Defendant, "prior to his arrest April 26, 1979, recalled the identity of the persons with whom he had spent the evening of April 20, 1979." Said Count further alleges that the Defendant's testimony on this matter was false in that he "knew prior to his arrest April 26, 1979, he had been with Frederick Allen Kirschwing and Howard Jerome Kinsey, Jr., the evening of April 20, 1979."

The Court below remanded the case to the District Court with directions to dismiss Count VI of the indictment because prosecution thereon was barred by the doctrine of collateral estoppel. In all other respects, the order of the

District Court was upheld. Thus, the Defendant is presently subject to prosecution on Counts II, III and V of the indictment.

REASONS FOR ALLOWANCE OF THE WRIT

That part of the decision below upholding the Defendant's prosecution on Counts II, III, and V of the indictment presents a clear conflict with the holding in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

The Court below held that, notwithstanding the Defendant's acquittal on all charges, since the jury was not necessarily required to believe the

Defendant's testimony regarding the collateral matters which are the subject of the present perjury case, the doctrine of callateral estoppel is inapplicable to Counts II, III and V.

The Defendant submits that the Court of Appeals erroneously applied the "hypertechnical archaic approach of a 19th Century pleading book" cautioned against in Ashe, supra. As stated therein, the inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceeding. The doctrine of collateral estoppel, as set forth in Ashe, supra, must be applied with "realism and rationality."

The gist of the defense was that Mr. Griggs while drinking heavily had become involved in a poker game at a bar in St. Augustine, Florida, with several individuals unknown to him at the time.

Mr. Griggs later went to dinner with one of the participants in the game, Frederick Allen "Butch" Kirschwing. The Defendant was unaware of the counterfeit nature of the bills passed that evening.

The evidence with respect to Mr. Kirschwing was overwhelming concerning his involvement in passing counterfeit currency.

At trial, the Government made Mr. Griggs' knowledge of and association with Mr. Kirschwing an extremely important and crucial fact. Equally important and crucial was whether Mr. Griggs had been involved in a poker game.

A review of the Defendant's testimony reveals that he stated that he didn't know Kirschwing very well and that he didn't even remember that he was with Kirschwing on the night in question until some time later, after his arrest. In

order to disprove this, the Government called Agent Pettway to testify. Agent Pettway testified that he asked Mr. Griggs on the day of his arrest whether he knew anything about Butch. Agent Pettway further testified that in response the Defendant said that he was not going to tell anything about the people he was with because he was not a snitch.

During closing argument, the Government seized on this testimony in arguing that the Defendant had guilty knowledge. As stated by the prosecutor, "If he didn't know that counterfeit bills were passed that night, there would have been nothing to snitch on at all."

The Government argued that the Defendant must be lying about his not remembering who he was with on April 20, 1979. With regard to this issue the Government argued to the jury that,

"Now, last and most important, I think, ladies and gentlemen, is the paucity of the defendant's story."

With respect to the issues of Mr. Griggs allegedly visiting Mr. Kirschwing at a fish camp and warning him and others that they were under investigation, the record reveals these issues were addressed by the Court during a proffer outside the jury's presence. However, the Court refused to allow the Defendant to be questioned about these issues before the jury.

The Government argued to the jury that:

> The issue is whether the evidence shows the defendant was guilty or whether you believe the defendant's story.
>
> Let's look at the credibility of that story. He got this money from either playing liar's poker or he got it from Butch.

The prosecutor further stated, "I submit it's incredible on its face, though, the story he told about liar's poker . . . " And in his final few words to the jury the prosecutor said:

> I submit to you that the defendant certainly has a story of convenience. I submit his story insults your intelligence, ladies and gentlemen. His story to you is just as counterfeit as these bills are.

Based upon the record of the first case, the United States Court of Appeals for the Fifth Circuit determined as a matter of fact that the jury that acquitted Mr. Griggs necessarily determined that he did not know that the money passed by him and others on April 20, 1979, was in fact counterfeit. United States v. Griggs, 651 F.2d 396 (5th Cir. 1981).

The Defendant submits that the jury herein was called upon to judge the Defendant's credibility concerning the

interwoven factual issues of Mr. Griggs knowing involvement of association with Frederick Allen Kirschwing during April, 1979.

The credibility of the Defendant's testimony was the theory upon which the case was tried. It is submitted that no rational jury could have acquitted the Defendant had they disbelieved his testimony regarding Mr. Kirschwing.

CONCLUSION

For the reasons set forth above, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

H. JAY STEVENS
Federal Public Defender

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing have been furnished to the Solicitor General, Room 5143, Main Justice Bldg., 10th & Constitution Avenue, N.W., Washington, D. C. 20530, by mail, this 8th day of September, 1983.

_____
Assistant Federal Public Defender

APPENDIX

A - Decision of the Court of Appeals, May 3, 1983.

B - Order on Petition for Rehearing, June 27, 1983.

Exhibit A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6182

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appetlant,

v.

CHARLES GRIGGS,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(May 3, 1983)

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

PER CURIAM:

This is an appeal and cross-appeal from the judgment of the district court granting in part and denying in part defendant's motion to dismiss an indictment charging six counts of violation of 18 U.S.C. § 1613, false declarations before a jury or court. The district court dismissed Count IV for failure to state an offense. The court granted the defendant's motion to dismiss on the grounds of collateral estoppel as to Count I, which decision the government appeals, but denied the motion to dismiss the remaining four counts, which defendant appeals.

The facts of this case are explored in depth in United States v. Griggs, 651 F.2d 396 (5th Cir. Unit B 1981), and in the opinion of the district court. Because we agree with the reasoning of the district court as to all counts except

Count VI, we adopt its opinion, with the aforesaid exception, as our own. As to Count VI, we write separately.

In denying the motion to dismiss Counts II, III, V, and VI the district court stated: " . . . all of the remaining counts of the instant indictment deal with actions and events occurring at times other than the evening of April 20, 1979, which is the date upon which defendant was alleged to have passed the counterfeit bills." Count VI charges that "[i]t was a matter material to said trial to determine whether Charles D. Griggs and Frederick Allen Kirschwing had been playing "liar's poker" together at the White Lion Bar on the afternoon of April 20, 1979." Count VI further charges that Griggs' testimony to this effect was perjured. Although the events charged in Count VI occurred the afternoon, and

not evening, of April 20, as a factual matter they were pertinent to, and encompassed within, matters adjudicated previously concerning the evening of April 20.

As the district court recognized, Griggs' motion to dismiss Count VI should be denied only if "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The factual issue presented is whether the jury that initially acquitted Griggs could have based the acquittal on some grounds other than the transfer of money during the "liar's poker" game. The government asserts a rational jury could so conclude, arguing Griggs stated he was only a conduit for the passed counterfeit bills; by this reasoning, Griggs need not have acquired any bills of his own in the poker game.

In United States v. Griggs, 651 F. 2d 396 (5th Cir. Unit B 1981) we stated:

> Griggs testified on his own behalf. The defense proceeded on the theory that Griggs was unaware of the fact that the bills were counterfeit. In support of this theory, Griggs testified that he acquired the fifty dollar bills at the White Lion's Tavern in Saint Augustine, Florida, where he participated in a "liar's poker game" with Kirschwing. He further testified that after drinking a considerable amount of alcoholic beverages and playing "liar's poker," he and Kirschwing decided to travel to Jacksonville to have dinner. Although he did not recall paying for the drinks that the three men had at the bar, he remembered that Kirschwing supplied the fifty dollar bills which he gave to the waiter to pay the check. He admitted that he supplied the fifty dollar bill which was passed to the waiter in order to obtain change.

Id. at 399.

As the above quotation makes clear, Griggs testified that in at least one instance, providing the fifty dollar bill

for change, he was not a conduit, but provided the bill himself. We also concluded Griggs "had no knowledge that the counterfeit bills which he passed at Twelve North Restaurant were counterfeit," id. (emphasis supplied). On the facts of the case, therefore, the jury must have concluded Griggs won the fifty dollar bill in the poker game earlier that day. This issue having previously been litigated we reverse the court below as to Count VI and remand with directions to dismiss that count.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

Exhibit B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6182

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Plaintiff-Cross Appellant,

versus

CHARLES GRIGGS,

Defendant-Appellant,
Defendant-Cross Appellee.

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Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING

(JUNE 27, 1983)

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is

hereby *denied*.

ENTERED FOR THE COURT:

/s/ *Phyllis Kravitch*
United States Circuit Judge

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